

ORIGINAL

No. 91-5771

Supreme Court, U.S.

FILED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HAROLD RAY WADE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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QUESTION PRESENTED

Whether the district court has the authority to review the government's refusal to file a "substantial assistance" motion under Sentencing Guidelines § 5K1.1 and then impose a sentence below the statutory minimum and applicable Guidelines range.

(I)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 936 F.2d 169.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1991. The petition for a writ of certiorari was filed on September 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Middle District of North Carolina to conspiracy to possess with intent to distribute and to distribute cocaine, in

violation of 21 U.S.C. 846; possession with intent to distribute cocaine and distribution of cocaine, both in violation of 21 U.S.C. 841(a)(1); and use of a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). He was sentenced to a total of 15 years' imprisonment. The court of appeals affirmed. Pet. App. A1-A9.

1. On October 30, 1989, police officers executed a search warrant at petitioner's residence in Alamance County, North Carolina. After discovering 978 grams of cocaine, two handguns, and more than \$22,000 in cash, the officers arrested petitioner. Following his arrest, petitioner admitted that he and an accomplice had traveled to Florida a few days earlier, where they had purchased a kilogram of cocaine for resale in North Carolina. Gov't C.A. Br. 3.

2. The presentence report noted that petitioner was subject to a mandatory minimum sentence of ten years' imprisonment on the drug charges and a consecutive mandatory sentence of five years' imprisonment on the firearms charge. Presentence Report 7; see 21 U.S.C. 841(b)(1)(B); 18 U.S.C. 924(c). In calculating the applicable Sentencing Guidelines range, the report recommended a two-level upward adjustment in petitioner's offense level pursuant to Guidelines § 3C1.1 for obstruction of justice. The report found that petitioner had obstructed justice by writing a letter urging another man to claim falsely that he was the owner of the handguns found in petitioner's residence. Presentence Report 2.

At sentencing, petitioner's counsel proffered evidence that petitioner had sought to cooperate with the government after his arrest by meeting with federal agents and providing them with information about other drug traffickers. C.A. App. 15. Counsel argued that the district court should sentence petitioner below the statutory minimum and the applicable Guidelines range because of petitioner's cooperation with the government, even though the government had not filed a motion requesting a downward departure under Guidelines § 5K1.1.¹ C.A. App. 11-13. The district court declined to depart downward based on petitioner's cooperation, concluding that it lacked the authority to do so in the absence of a motion by the government. C.A. App. 12-13. The court sentenced petitioner to the statutory minimum sentences on both the drug and firearms charges. C.A. App. 19-20.

3. The court of appeals affirmed. Pet. App. A1-A9. The court concluded that although there "appear[ed] to be no disagreement on the fact that shortly after his arrest and without the benefit of a plea agreement, [petitioner] began a course of cooperation which provided valuable assistance to the government in other prosecutions," Pet. App. A2, the district court nevertheless was without authority to depart downward from the mandatory minimum sentence in the absence of a motion by the government. Pet. App. A3. The court held that because "the government

¹ Section 5K1.1 permits the sentencing court to depart from the Guidelines "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."

has the sole discretion in deciding whether to file a motion for downward departure for substantial assistance, it follows that the defendant may not inquire into the government's reasons and motives if the government does not make the motion."² Pet. App. A7.

ARGUMENT

Petitioner contends (Pet. 5-12) that the district court should have the authority to review a prosecutor's refusal to file a "substantial assistance" motion requesting a downward departure under Guidelines § 5K1.1 and then impose a sentence below the statutory minimum and the applicable Guidelines range. As the courts of appeals have consistently and correctly held, however, a sentencing court has no authority to impose -- on "substantial assistance" grounds -- a sentence below the statutory minimum or the Guidelines range in the absence of a motion by the government. See, e.g., United States v. Long, 936 F.2d 482, 483 (10th Cir. 1991); United States v. LaGuardia, 902 F.2d 1010, 1013-1017 (1st Cir. 1990); United States v. Alamin, 895 F.2d 1335, 1337 (11th Cir.), cert. denied, 111 S. Ct. 196 (1990); United States v. Coleman, 895 F.2d 501, 504-505 (8th Cir. 1990); United States v. Francois, 889 F.2d 1341, 1345 (4th Cir. 1989),

² The court noted, however, that a defendant could take advantage of the "substantial assistance" provisions by "negotiat[ing] a plea agreement with the government under which the defendant agrees to provide valuable cooperation [in exchange] for the government's commitment to file a motion for a downward departure." Pet. App. A7-A8.

cert. denied, 110 S. Ct. 1822 (1990).³ This Court has recently declined on several occasions to review that issue, e.g., Chotas v. United States, cert. denied, 111 S. Ct. 1421 (1991); Sutton v. United States, cert. denied, 111 S. Ct. 759 (1991); Rexach v. United States, cert. denied, 111 S. Ct. 433 (1990). Petitioner offers no persuasive reason for the Court to treat this case differently.

In any event, petitioner's claim is meritless. Section 3553(e) of Title 18 provides that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below the level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Sentencing Guidelines § 5K1.1, which the Sentencing Commission patterned after Section 3553(e), similarly provides that a court may depart from the Guidelines "[u]pon motion of the Government stating that the defendant has provided substantial assistance" to the government. The prerogative accorded to the government by Congress and the Commission in promulgating the "substantial assistance" provisions is akin to the "exclusive authority and absolute discretion" enjoyed by the government in determining whether to prosecute, see United States v. Nixon, 418

³ Petitioner mistakenly relies on the dissenting opinion in United States v. Gutierrez, 908 F.2d 349 (8th Cir. 1990). The panel's decision in that case was vacated when rehearing en banc was granted, *id.* at 349, and the en banc court divided evenly, thereby affirming the district court without opinion. United States v. Gutierrez, 917 F.2d 379 (8th Cir. 1990) (en banc); see United States v. Hubers, 938 F.2d 827, 829 (8th Cir. 1991).

U.S. 683, 693 (1974), or what charges to bring, see United States v. Batchelder, 442 U.S. 114, 124-125 (1979); see also United States v. Huerta, 878 F.2d 89, 92 (2d Cir. 1989), cert. denied, 493 U.S. 1046 (1990). Like the decisions whether and how to prosecute, the government's decision not to file a "substantial assistance" motion is not subject to judicial review.⁴ Huerta, 878 F.2d at 94; see also United States v. Kuntz, 908 F.2d 655, 657 (10th Cir. 1990).

To be sure, as petitioner points out (Pet. 6-10), several courts of appeals have left open the question whether a bad faith refusal by the government to file a "substantial assistance" motion is subject to judicial scrutiny.⁵ See United States v.

⁴ As petitioner acknowledges (Pet. 9), the courts of appeals have uniformly upheld the government motion requirement of 18 U.S.C. 3553(e) and Guidelines § 5K1.1 against due process challenges. See, e.g., United States v. Doe, 934 F.2d 353, 356-358 (D.C. Cir. 1991), cert. denied, No. 91-6633 (Oct. 7, 1991); United States v. Harrison, 918 F.2d 30, 33 (5th Cir. 1990); United States v. Kuntz, 908 F.2d 655, 657-658 (10th Cir. 1990); United States v. Levy, 904 F.2d 1026, 1035-1036 (6th Cir. 1990), cert. denied, 111 S. Ct. 974 (1991); United States v. LaGuardia, 902 F.2d 1010, 1013-1017 (1st Cir. 1990); United States v. Lewis, 896 F.2d 246, 249 (7th Cir. 1990); United States v. Francois, 889 F.2d 1341, 1343-1345 (4th Cir. 1989), cert. denied, 110 S. Ct. 1822 (1990); United States v. Grant, 886 F.2d 1513, 1513-1514 (8th Cir. 1989); United States v. Huerta, 878 F.2d 89, 93-94 (2d Cir. 1989), cert. denied, 493 U.S. 1046 (1990); United States v. Ayarza, 874 F.2d 647, 653 (9th Cir. 1989), cert. denied, 493 U.S. 1047 (1990); United States v. Musser, 856 F.2d 1484, 1487 (11th Cir. 1988), cert. denied, 489 U.S. 1022 (1989).

⁵ Petitioner also notes (Pet. 7-8) that several courts have suggested, as the court of appeals did here, that when the government has expressly agreed to make a motion for downward departure in exchange for the defendant's cooperation, the sentencing court may review the government's refusal to file a "substantial assistance" motion to determine whether the agreement has been breached. See, e.g., United States v. Conner, 930 F.2d 1073, 1075 (4th Cir. 1991); United States v. Rexach, 896

Mena, 925 F.2d 354, 356 (9th Cir. 1991); United States v. Justice, 877 F.2d 664, 668-669 (8th Cir.), cert. denied, ~~110-6~~ 493 U.S. 73 Ct. 375 (1989); United States v. White, 869 F.2d 822, 829 (5th Cir.), cert. denied, 490 U.S. 1112 (1989). That issue, however, is not presented here. While petitioner may have provided assistance to the government in other prosecutions, Pet. App. A2, he has made no showing that the assistance he provided was sufficiently substantial to entitle him to a "substantial assistance" motion under the standards applied by the United States Attorney's Office. Moreover, the presentence report concluded that petitioner obstructed justice in his own case by encouraging another man to make a false claim of ownership of the guns involved in petitioner's offense. Under these circumstances, petitioner cannot reasonably complain that the government acted in bad faith in refusing to file a "substantial assistance" motion.⁶

F.2d 710, 713-714 (2d Cir. 1990). Those decisions have no bearing here, however, because there was no such agreement in this case. Pet. App. A2.

⁶ We are unaware of any court of appeals decision finding bad faith in a prosecutor's refusal to file a "substantial assistance" motion. See generally United States v. Brown, 912 F.2d 453 (10th Cir. 1990); United States v. Speeg, 911 F.2d 126 (8th Cir. 1990); United States v. Smitherson, 889 F.2d 189 (8th Cir. 1989).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

NINA GOODMAN
Attorney

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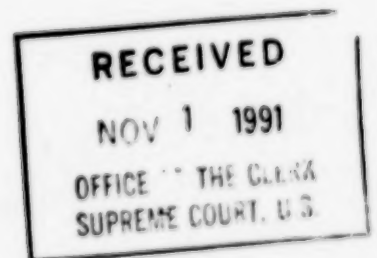
CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF IN OPPOSITION by mail on October 31, 1991. THE UNITED STATES IN

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KENNETH W. STARR
Solicitor General

October 31, 1991



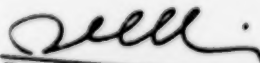
CERTIFICATE OF SERVICE

I, J. Matthew Martin, do hereby certify that I did on this date serve copy of the foregoing Motion for Leave to Proceed In Forma Pauperis with regard to the above-captioned case by enclosing said copy of Motion in a self-addressed, stamped envelope and depositing said envelope in an official United States Depository addressed as follows:

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The Honorable Kenneth W. Star
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U.S. Department of Justice
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This the 10th day of September, 1991.



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